

Fair Political Practices Commission
MEMORANDUM

To: Chairman Randolph and Commissioners Blair, Downey, Huguenin and Remy

From: Andreas C. Rockas, Commission Counsel, Legal Division
Carla Wardlow, Chief, Technical Assistance Division
Luisa Menchaca, General Counsel

Date: August 21, 2006

Subject: Adoption of Proposed Amendments to Regulation 18754 - Statements of Economic Interests for Members of Boards or Commissions of Newly Created Agencies.

I. EXECUTIVE SUMMARY

The proposed amendments would affect 2 California Code of Regulations section 18754, which interprets and implements Government Code section 87302.6 of the Political Reform Act (“Act”).¹ The regulation and section at issue state the economic interest disclosure requirements for members of governing boards or commissions of newly created agencies.

The July 12, 2006, prenotice version (as well as the currently proposed version) of regulation 18754 contain no decision points. At the prenotice presentation of this project, the commissioners and the public had no questions or comments for staff regarding this project. Therefore, with the exception of one notable, yet non-substantive, change (in the wording of the first phrase of subdivision (a)(3)), the regulatory amendments currently being presented to the Commission for adoption are the same as those that were presented to the Commission at the prenotice stage.

As you may recall, the aim of the proposed amendments to regulation 18754 is, in one instance, to narrow one reporting exception and, in other instances, to reduce the number of nearly-duplicative filings required of certain governing board members of new agencies. Specifically, the proposed amendments are meant to exempt a governing board member of a new agency from filing another Statement of Economic Interests (“SEI”) where, at the time of taking his or her seat on the new board, he or she is already a public official subject to equal or greater disclosure obligations. The need for such an amendment was identified by the Commission’s Technical Assistance Division (“TAD”).

¹ Government Code sections 81000 – 91014. Commission regulations appear at title 2, sections 18109 – 18997, of the California Code of Regulations. All further references to “section” are to the Government Code, and all references to “regulation” are to title 2 of the California Code of Regulations, unless otherwise indicated.

II. BACKGROUND

As you may recall, all public officials fall into one of two categories of SEI filers created by the Act: First, those governed by sections 87200 et seq., includes most high-ranking elected officeholders,² and second, those governed by sections 87300 et seq., which cover all positions in a state or local government agency “which involve the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest . . .” (section 87302(a)) and are not covered by section 87200. The first group is often referred to as “87200 filers” and their positions are listed in section 87200. The second group is often referred to as “designated employees” or “87300 filers” and their positions are listed in conflict of interest codes which each governmental agency in California is required to adopt and promulgate.³

Section 87302.6,⁴ effective January 1, 2003, dictates how SEI’s are to be filed by a subcategory of “designated employees” – members of boards and commissions of newly created agencies not listed in section 87200. Prior to section 87302.6, members of boards and commissions of newly created agencies did not have to file SEI’s until after a conflict of interest code was created and adopted by the new agency. Since a new conflict of interest code can sometimes take months to create and implement, many board and commission members, appointed to new agencies prior to the advent of section 87302.6, were making broad-ranging governmental decisions without having provided any information to the public regarding their economic interests. The Legislature sought to remedy this dearth of information by implementing section 87302.6. That section states:

“Notwithstanding Section 87302, a member of a board or commission of a newly created agency shall file a statement at the same time and in the same manner as those individuals required to file pursuant to Section 87200. A member shall file his or her statement pursuant to Section 87302 once the agency adopts an approved conflict-of-interest code.”

² These 87200 filers (sometimes referred to as “statutory filers”) include, for example, elected state officers, judges, members of certain state commissions like the FPPC, heads of local governmental bodies, those who manage public investments, and candidates for any of the elected offices in this category. These officials are subject to the most expansive disclosure requirements possible under the Act due to the nature of their duties.

³ These 87300 filers include government employees with very little discretion, as well as the highest-ranking members of agencies not listed in section 87200. Examples of high-ranking 87300 filers include heads of state agencies, appointed governing board members, and supervisory employees of some cities and counties. Many higher-ranking 87300 filers are required to provide as broad a disclosure (sometimes referred to as “full” disclosure) as 87200 filers.

⁴ The text of section 87302.6 (which was part of SB 1620, Stats. 2002, Chapter 264) and various legislative analyses thereof are attached to former Legal Division Counsel Kenneth L. Glick’s February 19, 2003, memorandum to the Commission proposing adoption of regulation 18754, which implements section 87302.6.

Therefore, section 87302.6 obligates a member of a board or commission of a newly created agency (state or local) to make full or 87200-like disclosure of his or her economic interests relative to the jurisdiction of the new agency.⁵ After adoption and implementation of the new agency's conflict of interest code, the member is to file pursuant to the new code.

To facilitate the implementation of section 87302.6, the Commission adopted regulation 18754 on March 27, 2003, and entitled it, "Statements of Economic Interests (Members of Board or Commissions of Newly Created Agencies); When and Where to File." Subdivision (a) of regulation 18754 states:

“(a) Applicability:

(1) Pursuant to Government Code section 87302.6, a member of a governing board or commission of a newly created agency shall disclose his or her economic interests pursuant to Government Code sections 87202 through 87210. This requirement applies until such time as the member is included in an approved conflict-of-interest code in effect for the governing board or commission of which he or she is a member.

(2) For purposes of Government Code section 87302.6, ‘newly created agency’ means any state agency or local government agency, as defined in Government Code sections 82003, 82041, and 82049, which has come into existence on or after January 1, 2003.

(3) Exceptions

(A) A person who is listed or enumerated in Government Code section 87200 is not subject to this section.

(B) A person who is a member of a board or commission of a newly created agency is not subject to this section, when that board or

⁵ Though the literal language of section 87302.6 applies to all members of boards or commissions of newly created agencies, it is not necessary to apply the statute to members who were already filing as 87200 filers (for the same or greater geographic area covered by the new agency) because there is no gap in filing where an annual filing requirement under section 87200 already applies. (See also section 87302(b) and reg. 18730(b)(3) [which do not establish any disclosure obligations under a conflict of interest code for 87200 filers].) Consequently, section 87202 (which implies that 87200 filers who filed their annual SEI over 60 days prior must file again) does not apply in this context merely because 87302.6 filers must file “at the same time and in the same manner” as 87200 filers. The 60-day rule of section 87202 applies to existing 87200 filers who are appointed to another 87200 position where the second position is in an existing agency. For example, assume that Ms. Duright is a commissioner for the FPPC and filed her last annual SEI on March 1, 2006. On May 1, 2006 (or 61 days later) she is appointed to sit on the California Coastal Commission (“CCC”). Since the CCC is not a newly created agency, section 87302.6 does not apply, section 87202 does apply, and Ms. Duright must file another SEI within 30 days after assuming office.

commission does not possess decisionmaking authority as defined in 2 Cal. Code Regs. section 18701(a)(1).”

Aside from detailing when and where persons subject to section 87302.6 must file their SEI's, regulation 18754 in subdivisions (b) & (c) describes only two categories of people who are currently excepted from its scope. (See regulation 18754(a)(3).)

The two exceptions in regulation 18754 cover: (A) a person who holds a position listed in Government Code section 87200, and (B) a person who is a member of a board or commission of a newly created agency that does not possess decisionmaking authority pursuant to regulation 18701(a)(1). The (imperfect) rationale for the first exception is that 87200 filers already have full disclosure obligations and any reporting under the regulation would, therefore, be redundant. The reason the rationale is imperfect is because although all 87200 filers have “full” disclosure obligations, full disclosure is defined according to the geographical jurisdiction of the 87200 filer in question. (See sections 82030 [definition of “income”]; 82033 – 82035 [definitions of “interest in real property,” “investment,” and “jurisdiction”]; 87201 – 87209.) For example, the full disclosure obligation of an official who is an 87200 filer by virtue of his being the city treasurer of a small city, is much narrower than the full disclosure obligation of an 87200 filer who is a member of the Public Utilities Commission, which has statewide jurisdiction. One of the proposed amendments attempts to close a reporting gap resulting from this distinction.

The rationale for the second exception is that these officials, having no decisionmaking authority, should not be required to disclose economic interests that they cannot affect by their participation on that board or commission.

III. PROPOSED REGULATORY ACTION

The proposed regulation seeks to fine tune the SEI disclosure requirements placed upon members of governing boards of newly created agencies. As previously stated, before the effective date of section 87302.6 in January 2003, members of governing boards of newly created agencies could make governmental decisions for nearly a year before having to disclose any of their economic interests, due to the time it takes for a new agency to develop and adopt a conflict of interest code. After section 87302.6 was implemented, that changed.

A. The Problems Currently Not Being Addressed By Regulation 18754

Since March 2003, *all* members of governing boards of newly created agencies with decisionmaking authority – who were not 87200 filers by virtue of some other governmental position they already held – have been obliged to file new full-disclosure SEI's. (Regulation 18754(a)(3).) However, this rule contains an exception that is arguably too broad, in one instance (the exception applying to all 87200 filers, regardless of the geographic scope of the jurisdiction that obligated them to disclose under section 87200, thus creating a reporting gap), and mandates over reporting in another instance

(the lack of a reporting exception for officials who are already disclosing as much or more relevant information about their economic interests before assignment to a new agency).⁶

B. A Solution: Proposed Amendments To Subdivision (a)(3)

In order to (1) narrow the reporting exception to less than *all* 87200 filers, and (2) mitigate the burden of nearly-duplicative disclosures, staff proposes the following substantive amendments to subdivision (a)(3) of regulation 18754.

(a) Applicability:

¶ ... ¶

(3) ~~Exceptions~~ A member of a governing board or commission of a newly created agency is not subject to this regulation if subsections (A), (B), (C) or (D) of subdivision (a)(3) of this regulation applies:

(A) ~~A person who is listed or enumerated in Government Code section 87200 is not subject to this section. The member also holds a position specified in Government Code section 87200 and the geographical jurisdiction of the newly created agency is the same as or is wholly included within the jurisdiction in which the member must report his or her economic interests pursuant to article 2 of chapter 7 of this title, Government Code sections 87200 et seq.~~

(B) The member is also designated in a conflict of interest code for another agency and all of the following apply:

(i) The geographical jurisdiction of the newly created agency is the same as or is wholly included within the jurisdiction of the other agency;

(ii) The disclosure assigned to the member in the code of the other agency is the same as that required under article 2 of chapter 7 of this title, Government Code sections 87200 et seq.; and

(iii) The filing officer is the same for both agencies.

(C) The newly created agency was formed as a result of the merger of two or more agencies and all of the following apply:

(i) The member served on the governing board or commission of an agency abolished in the merger in substantially the same capacity as the member will serve on the governing board or commission of the newly created agency;

(ii) The geographical jurisdiction of the newly created agency is the same as the jurisdiction of the abolished agency; and

(iii) The member was previously subject to the same disclosure as required for persons listed in Government Code section 87200.

⁶ Agencies are prohibited from requiring more disclosure than is necessary to comply with the Act. (*In re Alperin* (1977) 3 FPPC Ops. 77; *Carmel-by-the-Sea v. Young* (1970) 2 Cal.3d 259.)

~~(B)(D) A person who is a member of a~~ The board or commission of a newly created agency is not subject to this section, when that board or commission does not possess decisionmaking authority as defined in 2 Cal. Code Regs. section 18701(a)(1).

Where before there were only two subsections under subdivision (a)(3), now there are four – all describing a different class of members of newly created governing boards excepted from the application of regulation 18754. The proposed amendments to subsection (A), and the addition of new subsections (B) and (C) are substantive in that they affect the scope of who must make full disclosure pursuant to section 87302.6. Suggested new subsection (D) is simply a re-designation and non-substantive rewording of old subsection (B).

As previously stated, the only notable (yet non-substantive) difference between the proposed version presented for adoption and that presented at the prenotice stage last July, is the wording of the initial phrase in subdivision (a)(3). The change made to that phrase is intended to clarify that in order to fall into an exception to regulation 18754, one must meet any one (or more) of the capital-lettered subsections under subdivision (a)(3).

C. Staff Recommendations

Staff recommends that the Commission approve the proposed amendments to regulation 18754 for adoption.

Attachment

Proposed Amendments to Regulation 18754.